Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1581

Appeal MA-010343-2

Toronto Police Services Board

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Toronto Police Services Board (the Police), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought information relating to contact between himself and another named individual, and the Police. The request includes access to video statements made by the named individual and records relating to an alleged agreement between the named individual and a named police detective.

In its decision, the Police granted partial access to the records, and applied the exemptions found in sections 8(1)(l) (facilitate commission of unlawful act), 9(1)(d) (relations between governments) and 14(1) of the *Act* (unjustified invasion of personal privacy). In invoking section 14(1), the Police relied on the presumption in section 14(3)(b) (law investigation). As the requester's information was also found in some of the records, the Police referred to the provisions of sections 38(a) and (b) of the *Act* (discretion to refuse requester's own information).

During mediation of this appeal through this office, certain issues were narrowed or clarified. Only Records 38, 40, 102 and the severed portion of 104 remain in issue. Section 8(1)(l) is no longer in issue.

I sent a Notice of Inquiry to the Police, initially, inviting them to send representations on the facts and issues raised by the appeal. As the Police have relied on section 9(1)(d) with respect to some of the records, taking the position that some of the information was received in confidence from Crown counsel with the Ministry of the Attorney General (the Ministry), I also notified the Ministry of the appeal and invited it to submit representations. Both the Police and the Ministry supplied representations which were subsequently shared with the appellant, with certain confidential portions severed. The appellant was provided with an opportunity to make representations in response to those of the Police and the Ministry and has not made any in writing, although he made some brief comments in a telephone message received by me.

RECORDS:

Record 38 is a memo from a Crown Attorney to a police officer.
Record 40 is a form completed by a Crown Attorney.
Record 102 is a videotape containing two interviews with the named individual.
Record 104 is an excerpt from a police officer's notebook.

The Police rely on the provisions of sections 9(1)(d), 14(1), 14(3)(b), 38(a) and 38(b) with respect to Records 38 and 40, and the provisions of sections 14(1), 14(3)(b) and 38(b) with respect to Record 102 and the severed portion of Record 104.

DISCUSSION:

PERSONAL INFORMATION

As I have indicated, the Police have relied on the provisions of sections 38(a) and 38(b) of the *Act*, in conjunction with sections 9(1)(d) and 14(1). In order to assess whether any of these

provisions apply, it is necessary to determine whether the records contain personal information, and to whom that personal information relates.

Under section 2(1) of the *Act*, "personal information" is defined as recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

I find that Records 38 and 40 of the records contain the personal information of the appellant. They may also contain the personal information of another individual, but it is unnecessary to make a determination on this issue, as I find these records exempt under sections 9(1)(d) and 38(a) in any event.

I find that Records 102 and 104 contain the personal information of the appellant as well as of another individual.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/RELATIONS WITH GOVERNMENTS

As the records contain the personal information of the appellant, section 36(1) of the *Act* is applicable to this appeal. Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38, however, provides a number of exceptions to this general right of access. Under section 38(a) of the *Act*, the institution has the discretion to deny an individual access to their own personal information in instances where the exemption in, among others, section 9 would apply to the disclosure of that information. In this case, the Police have relied on section 9(1)(d) in conjunction with section 38(a) to deny access to Records 38 and 40.

Section 9(1)(d)

Section 9(1) of the *Act* provides, in part:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (d) an agency of a government referred to in clause (a), (b) or (c);

The Police submit that Records 38 and 40 were created by or on behalf of an Assistant Crown Attorney who required that the Police make further inquiries into a particular aspect of the matter. This inquiry would assist the named Crown Attorney in fulfilling his prosecutorial duties involving this particular case. The Assistant Crown Attorney will often make

notes/comments/instructions regarding other aspects of the proceedings for others involved in the prosecution (including the officer in charge of the case) to act upon. It is submitted that the existence of a confidential channel of information exchange is essential in order for the Ministry and the Police to work together to carry out the administration of justice, and to ensure a fair judicial proceeding.

The Police submit that in discussions between them and the Ministry, it has been specifically identified that there is an expectation of confidentiality both during and after the judicial proceedings. The very name of the file itself – Confidential Crown Brief – makes this clear, and the Police have chosen to respect the Ministry's explicit direction in these matters.

The Police refer to, among others, Orders MO-1202, MO-1327 and MO-1313 in their submissions.

The Ministry submits, among other things, that Records 38 and 40 reveal information that the Police received on a confidential basis from Crown counsel in the Ministry. It is said that the communications in Records 38 and 40 are directly related to the prosecution of the appellant that was proceeding at the time the records were created. It is implicit in these documents that they were sent to the Police with an expectation of confidentiality, and the Ministry does not consent to their disclosure.

The Ministry also submits that if Records 38 and 40 had been sought from the Ministry, it would have claimed the discretionary exemption under section 19 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*), and that this factor should be given significant weight in the consideration of whether the Toronto Police should be ordered to disclose these two documents.

The Ministry further submits that while it is essential that Crown counsel fulfill all criminal law disclosure obligations to an accused person, it is also important to the proper administration of the criminal justice system that Crown counsel have a certain zone of privacy in order to prepare for the various steps in a criminal case. The nature of the criminal justice system being such that the police have primary responsibility for the investigative role in a case, and Crown counsel have the prosecutorial role, it is frequently necessary for Crown counsel to seek information and input from the police (in writing) in preparation for litigation, or to provide legal advice to the police regarding steps in the investigation. However, Crown counsel's written communications with the police might reveal not only what the Crown has explicitly stated on the face of the letter/message, but also, implicitly, Crown counsel's preliminary legal opinions and thoughts about the case, or what steps the Crown has been considering taking in the prosecution before the Crown has arrived at any firm decision.

The Ministry makes further submissions about the application of section 19 of the provincial *Act* in circumstances when the prosecution of a criminal case has ended, but it is not necessary to detail those here.

Analysis

The section 9(1) exemption has been applied in a variety of circumstances, including information provided to a police service from other police services (Order M-202), information provided to a municipality by the Ontario Realty Corporation (an agency of the provincial government) (Order M-1131), information provided to a police service by a ministry of the provincial government (Order MO-1569-F), and information provided to a police service by Crown Attorneys (see discussion below).

In these cases, it has been said that in order for section 9(1) to apply, the institution must demonstrate that the disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section **and** that the information was received by the institution in confidence.

In addition, in the specific case of information provided to a police service by Crown Attorneys, certain orders have linked the application of the section 9(1) exemption under the municipal *Act* to the application of an exemption under the provincial *Act*. In Order MO-1202, for example, former Adjudicator Holly Big Canoe discussed the requirements for the application of the section 9(1) exemption, in very similar circumstances to the ones before me. The record consisted of a Confidential Crown Envelope bearing entries made by a Crown Attorney. In that order, former Adjudicator Big Canoe considered whether the information would be exempt under the provincial *Act*, in the hands of the Ministry. She found that the information would fall under section 19 (solicitor-client privilege) of the provincial *Act*, and that the requirements for section 9(1) under the municipal *Act* were accordingly met.

This approach has been followed subsequently, in Orders MO-1292, MO-1313, and MO-1327 (the "Toronto Police Service cases").

I find the analysis in the Toronto Police Service cases sound, to the extent that a consideration of whether the information would have been exempt under the provincial *Act*, had it remained in the hands of the provincial institution, may be a significant factor in determining whether the same information was "received in confidence" and therefore exempt under section 9(1) of the municipal *Act*.

However, to the extent that there is also a suggestion in these cases that there is a direct link between the application of an exemption under the provincial *Act*, and the application of section 9(1) under the municipal *Act*, I have some reservations about such an approach. In my view, the applicability of an exemption under the provincial *Act* is not necessary and may not even be sufficient to the application of section 9(1)(d) of the municipal *Act*. As expressed in Order M-128 originally, and applied in other cases subsequently, the requirements for the application of section 9(1) (that disclosure of the record could reasonably be expected to reveal information received from one of the governments, agencies or organizations listed in the section, **and** that this information was received by the institution in confidence) are essentially questions of fact. Whether or not the information might have been exempt under the provisions of the provincial *Act* is a factor which may assist in applying section 9(1), but may not be determinative of the

issue. A finding that the information would have been exempt had it remained in the hands of the provincial institution does not necessarily lead directly to a finding that the same information is exempt in the hands of a municipal institution. Likewise, a finding that certain information would *not* have been exempt in the hands of the provincial institution does not dictate a conclusion that the information is not exempt in the hands of the municipal institution.

It should be noted that section 15(b) of the provincial *Act*, which is the provincial equivalent to section 9(1), also exempts information "received in confidence from another government or its agencies by an institution". Orders of this office applying section 15(b) of the provincial *Act* have adopted a fact-based approach to the issue more in keeping with Orders M-202, M-1131 and MO-1569-F than the approach in the Toronto Police Service cases, and have essentially looked for evidence as to the nature of the confidentiality understanding surrounding the provision of the information. In Order P-1629, for example, Assistant Commissioner Tom Mitchinson accepted the submission of the Ministry of Economic Development, Trade and Tourism that certain information in the records was received from the federal government in confidence, but did not accept that other information at issue was provided on a confidential basis. In Order PO-1915-F, Senior Adjudicator David Goodis found that the Ministry and the City had not provided the "necessary detailed and convincing evidence" to establish that disclosure of these records would reveal information the Ministry of the Attorney General received "in confidence" from the City of Toronto, either expressly or by implication.

In my view, the approach taken in the above orders, in essentially seeking to determine the basis on which information was shared between governments, is in keeping with the rationale for the section 9(1)/15(b) exemption, as discussed in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission), at pages 306-7:

> ... It is our view that an Ontario freedom of information law should expressly exempt from access material or information obtained on this basis from another government. Failure to do so might result in the unwillingness of other governments to supply information that would be of assistance to the government of Ontario in the conduct of public affairs. An illustration may be useful. It is possible to conceive of a situation in which environmental studies (conducted by a neighbouring province) would be of significant interest to the government of Ontario. If the government of the neighbouring province had, for reasons of its own, determined that it would not release the information to the public, it might be unwilling to share this information with the Ontario government unless it could be assured that access to the document could not be secured under the provisions of Ontario's freedom of information law. A study of this kind would not be protected under any of the other exemptions ... and accordingly, could only be protected on the basis of *an exemption permitting the government of Ontario to honour such understandings of confidentiality*. ... [emphasis added]

In conclusion, I prefer the approach to this issue taken in Orders M-202, M-1131, MO-1569-F and the provincial orders cited above, over the approach taken in the Toronto Police Service

cases. Accordingly, although it may be helpful to determine whether information would have been exempt in the hands of the sending institution (such as through the application of the solicitor-client privilege), it is not a necessary path to take in order to reach a conclusion on the applicability of section 9(1) of the *Act*.

In the case before me, I am satisfied that Records 38 and 40 contain information supplied to the Police by Crown counsel, and that the information was received by the Police in circumstances of confidentiality. In this respect, I accept the representations of the Police and of the Ministry as to the explicit and implicit understandings surrounding the receipt of this kind of information, in the context of the roles of these two institutions in criminal court proceedings.

I conclude, therefore, that Records 38 and 40 qualify for exemption under section 9(1)(d) of the *Act*.

Although section 9(1)(d) is a mandatory exemption, the fact that these records contain the personal information of the appellant brings them under section 38(a), which gives the Police a discretion on disclosure or non-disclosure. The Police have made submissions on the exercise of their discretion in favour of non-disclosure. They state that they weighed the right of the appellant to his personal information with that of the possible harm to the administration of justice should the confidential exchange of information and instructions between Crown counsel and the Police be compromised. The Police submit that the free flow of information and instructions between these two institutions, which is an essential element of the proper administration of justice and ultimately a fair and proper judicial proceeding, could be severely restricted. Should this disruption occur, the right of the public to retain their confidence in the performance of the Police and the Ministry could be damaged. The public expects a high level of cooperation and interaction between those institutions whose mandate it is to investigate and prosecute criminal offences. The Police submit that in the absence of such cooperation, due to the restriction of free flow of information and instructions, the public would lose confidence in those agencies entrusted with a significant public trust – that being the proper administration of justice. The Police state that having weighed the right of the appellant to his personal information with these concerns, the Police concluded that the possible harm of compromising the established confidentiality relationship between the Police and Crown counsel weighed in favour of non-disclosure.

Having regard to the above, I am satisfied that the Police have exercised their discretion properly in deciding not to grant access to Records 38 and 40.

I now turn to consider the application of section 14(1) in conjunction with section 38(b), to Records 102 and 104. Because of my findings on Records 38 and 40, it is not necessary to consider them in the following discussion.

INVASION OF PRIVACY

In addition to section 38(a), section 38(b) provides another exception to the general right of the appellant to have access to his own personal information. Under section 38(b), where a record

contains the personal information of both the requester and other individuals and an institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Section 38(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

In applying section 38(b), sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) *[John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The Police submit that the information in Records 102 and 104 was compiled as part of the investigation into charges of criminal harassment against the appellant. As described above, Record 104 is an excerpt from a police officer's notebook, one portion of which has been withheld. Record 102 is a videotape of two interviews with a named individual. The Police submit that this statement was created by them during the investigation of an offence under the Criminal Code of Canada and compiled as part of the information forwarded to the Crown Attorney for the purpose of the prosecution of the appellant.

The Police submit that both Record 102 and the severed portion of Record 104 fall under the presumption in section 14(3)(b) which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The Police have also referred to the criteria in sections 14(2)(e), (f) and (h), which state:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
(f) the personal information is highly sensitive;
(h) the personal information has been supplied by the individual to whom the information relates in confidence;

I am satisfied, on the basis of the evidence and representations before me, that the presumption in section 14(3)(b) applies to Record 102, in that it was clearly compiled as part of an investigation into a possible violation of law. It is not clear from the evidence before me whether Record 104 was created as part of the investigation, or following the investigation. Nevertheless, I am satisfied that its disclosure would constitute an unjustified invasion of personal privacy, taking into consideration the factors in sections 14(2)(f) and (h) (highly sensitive, and supplied in confidence).

Accordingly, I find that Records 102 and the severed portion of 104 qualify for exemption under section 14(1). Again, although section 14(1) is a mandatory exemption, the fact that the records contain the personal information of the appellant bring them under section 38(b), which provides the Police with a discretion to disclose or not to disclose. The Police have made submissions in support of their decision to exercise this discretion in favour of non-disclosure, and having regard to these, I find that they have exercised this discretion properly.

ORDER:

I uphold the decision of the Police to withhold Records 38, 40, 102 and part of 104 from disclosure.

Original Signed By: October 23, 2002
Sherry Liang
Adjudicator